THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION No.7959 OF 2007

7th September, 2007.

Between:
M/s Marine Jet Power AB,
a Company incorporated in Sweden,
having its principal office at
SE 74801 Osterbyburk, Sweden.

Also through:
M/s Dynatron Services,
D-5, Defence Colony,
New Delhi – 110 024. .. Petitioner.

And

Union of India, through
Ministry of Shipping, New Delhi
And others. .. Respondents.

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ORDER:

The Indian Coast Guard-the 3rd respondent herein, which is part of Indian Armed Forces, issued limited Tender Invitations to the 5 Shipyards in the country for fabrication/construction of five Inshore Patrol Vessels. The offer of the 2nd respondent-Hindustan Shipyard Limited, Visakhapatnam, was found to be the most competitive offer and accordingly, the same was accepted. Pursuant thereto, a contract dated 31.3.2006 was entered into between the 2nd respondent and the Ministry of Defence through the 3rd respondent for fabrication/construction of Inshore Patrol Vessels (IPVs). As per the terms and conditions of the said contract, the 3rd respondent retained simultaneous participation and approval of designs/drawings and purchase of important components used on the vessels. Appendix XXI

of the contract specified the list of machinery equipment for which the participation of the Coast Guard Headquarters (for short "CGHQ") is required. "Water Jets" is one of the items mentioned in the said list.

In terms of the contract, dated 31.3.2006, and in accordance with the technical specifications approved by CGHQ, the 2nd respondent issued a Tender Notice dated 23.8.2006 for procurement of 15 Water Jets with accessories, spares/tools to be fitted on the vessels as per the ship construction schedule. Though the due date for submission of tenders was initially fixed as 21.9.2006 and the technical bids were scheduled to be opened on 22.9.2006, the dates were extended from time to time up to 6.11.2006 and 7.11.2006, respectively.

It is not in dispute that in Appendix XXI of the contract dated 31.3.2006 itself the writ petitioner and the 4th respondent herein were short-listed by the 3rd respondent as approved makers of "Water Jets". Hence, the Tender Notice dated 23.8.2006 was limited only to the petitioner and the 4th respondent. Pursuant to the Tender Notice dated 23.8.2006, both the petitioner and the 4th respondent submitted their bids.

The Technical Bids of both the participants were opened on 7.11.2006. Whereas the writ petitioner offered supply of Water Jets of MJP 650 series, the 4th respondent offered MJP 750 series. The said offers were evaluated by the Technical Negotiation Committee (for short "TNC") consisting of a representative of the 2nd respondent, a representative of the 3rd respondent and the design consultant, Managing director Thornycroft Maritime & Associates Pty Ltd., Fremantle, Western Australia, which was constituted specifically for the evaluation of the offers made by the bidders and to offer recommendation on technicalities.

On 24.1.2007, the TNC held technical discussion with the writ petitioner. Similar technical discussion was held by the TNC with the

4th respondent on 23.1.2007. The above discussions were reduced to minutes and signed by various persons who attended the meeting.

The petitioner states that though nothing was mentioned by TNC about the compatibility of MJP 650 Water Jets during the discussions held on 24.1.2007, the 2nd respondent by letter dated 15.3.2007, called upon the petitioner to give its technical proposal for MJP 750 model. While asking the petitioner to confirm its acceptance of the price quoted for MJP 650 model to be applicable for supply of MJP 750 model, the petitioner was also given a choice of reducing the price already quoted for MJP 650 model. In response to the same, the petitioner submitted a techno commercial offer in respect of MJP 750 model on 21.3.2007.

However, challenging the 2nd respondent's communication dated 15.3.2007, the 4th respondent filed W.P.No.5633 of 2007 contending that the same amounts to inviting the petitioner herein (arrayed as Respondent No.4 in W.P.No.5633 of 2007) to submit a revised Technical Bid.

This Court while directing *Rule nisi*, by order dated 20.3.2007 in W.P.M.P.No.7194 of 2007 passed an interim order as under:

> "If the technical bid of the fourth respondent is rejected, the question of asking for revised technical bid from either of the tenderers does not arise. Without considering the technical bids already rejected the unqualified tenders shall not be considered in the meeting to be held on 21.3.2007."

At that stage, the petitioner was served with the 2nd respondent's letter dated 2.4.2007 informing that its offer, on evaluation by TNC, was technically rejected. It was also stated that the revised offer of the petitioner dated 21.3.2007 cannot be considered.

Meanwhile, the petition filed by the petitioner to vacate the interim order dated 20.03.2007 in W.P.No.5633 of 2007 came up for consideration before this Court. However since the 4th respondent

(writ petitioner therein) sought permission to withdraw the writ petition, this court by order dated 10.4.2007 dismissed W.P.No.5633 of 2007 as withdrawn observing as under:

> "Suffice it to record that with the dismissal of the writ petition as 'withdrawn' and not on merits, the interim order dated 20.3.2007 including all the observations there at are comprehensively effaced and *ab initio*. This is the legal position and the dismissal of the writ petition as 'withdrawn' does not mark out a distinction to this established position.'

Immediately thereafter the petitioner addressed a letter dated 12.4.2007 to the 2nd respondent bringing to their notice the final order in W.P.No.5633 of 2007 and requesting to allow the petitioner to continue in the Tender process. It was also specifically mentioned that holding price negotiations with only one supplier would be in contravention of Defence Procurement procedure.

Apprehending that the 2nd respondent may hold price negotiation with the 4th respondent, whose only offer remained in the fray, this writ petition was filed on 16.4.2007 seeking a *Mandamus* declaring the letter dated 2.4.2007 purportedly rejecting the petitioner's quotation dated 21.3.2007 in respect of MJP 650 and MJP 750 models as illegal and to hold price negotiations with the petitioner and the 4th respondent for selecting the "water jets" pursuant to the tender notice dated 23.8.2006.

In the counter-affidavit filed on behalf of the 2nd respondent, it is stated that after holding technical discussions with the writ petitioner on 24.1.2007, the TNC through its report dated 26.1.2007 opined that the technical bid of the writ petitioner for supply of water jet model MJP 650 was not acceptable. The TNC recommended acceptance of the technical bid of the 4th respondent. The recommendations of the TNC by its report dated 26.1.2007 were accepted by the 2nd respondent on 1.3.2007. Since the 4th respondent was technically qualified, by letter dated 6.3.2007, the 4th respondent was informed about the schedule

for opening the price bid on 12.3.2007 stating that the Price Negotiation Committee (PNC) will meet the representative of the 4th respondent between 12.3.2007 and 14.3.2007. In the meanwhile, the writ petitioner by its letter dated 8.3.2007 requested for affording an opportunity in the subject tender notice. Accordingly, the PNC meeting was rescheduled and, ultimately, on 3.4.2007, the price bid of the 4th respondent was opened and negotiations were held by PNC on 4.4.2007. Pursuant thereto, on 18.4.2007, the 2nd respondent placed a Letter of Intent on the 4th respondent for purchase of 15 water jets.

Though the fact that the writ petitioner was called upon by letter dated 15-3-2007 to give an offer for supply of water jets of MJP 750 model and also to revise the price already quoted has not been disputed, it is explained that the said exercise was undertaken to convince the 3rd respondent for reconsideration of the issue before taking any decision for issuing a Letter of Intent to the most competent bidder. It is also stated that the revised offer with reduced cost was called for only to generate competitiveness in the tender. The said course adopted by the 2nd respondent was objected to by the 4th respondent herein and a complaint was lodged with the respondents 1 and 3. Pursuant thereto, the 1st respondent-Ministry of Defence convened a meeting and after reviewing the entire tender process, decided that the reconsideration of technical bids with fresh offer is unacceptable. In the circumstances, the 2nd respondent has decided to implement the recommendations of TNC dated 26.1.2007 and, accordingly, the price bid of the 4th respondent was opened on 3.4.2007. In the meanwhile, by letter dated 2.4.2007, the petitioner was informed that its technical bid was rejected. It is contended by the 2nd respondent that the entire procedure followed by it was in accordance with the terms and conditions of the contract between the respondents 2 and 3 as well as the guidelines issued by the Chief

Vigilance Commissioner and the provisions of the Defence Procurement Manual, 2006. Since the writ petitioner's technical bid was found to be unsuitable by a Technically Competent Committee, the same was rightly rejected.

A separate counter-affidavit has been filed on behalf of the 4th respondent stating that since the 4th respondent was found to be the sole technically qualified bidder, the PNC conducted negotiations with it and issued the Letter of Intent for execution of the contract. The said action of the 2nd respondent being in conformity with the terms of the tender floated and also in strict compliance with the guidelines issued by the Central Vigilance Commission and the Defence Procurement Procedure 2006, interference of this Court is not warranted on any ground whatsoever.

I have heard the learned counsel for both the parties and perused the material on record.

The learned counsel for the petitioner Sri S. Ravi primarily contended that since admittedly in the contract entered into between the respondents 2 and 3, the writ petitioner and the 4th respondent were short-listed for procurement of water jets, the petitioner is deemed to have been pre-qualified and therefore the 2nd respondent committed an error in technically disqualifying the petitioner.

On the other hand, the learned counsel appearing for the 2nd respondent submitted that the 2nd respondent is bound by the terms and conditions of the agreement entered into with the 3rd respondent and that since the 3rd respondent had instructed to open the price bid of the 4th respondent and conduct price negotiations with them and to inform the petitioner that they were technically rejected, the impugned communication was sent to the petitioner rejecting its technical bid.

The learned Counsel for the 4th respondent contended that the 4th respondent being the sole technically qualified bidder, the 2nd

respondent has already successfully conducted PNC meeting and issued Letter of Intent in favour of the 4th respondent for execution of the contract and therefore the writ petition has become infructuous and liable to be dismissed on that ground alone.

It is not in dispute that the tenders in question were floated by the 2nd respondent, which undertook the work of ship building/ship repairs and etc., for the 3rd respondent. It is also not in dispute that the evaluation of the bids received pursuant to the tender floated by the 2nd respondent and the finalisation of the same shall be subject to terms and conditions of the contract dated 31-3-2006 between the respondents 2 and 3 and subject to approval by CGHQ.

In the counter-affidavit filed on behalf of the 2nd respondent – Tender Inviting Authority – it is explained that the TNC which held technical discussion with the writ petitioner on 24-1-2007 submitted its report dated 26-1-2007 holding that the technical bid of the writ petitioner offering water jet model MJP.650 was not acceptable. The reasons stated in the TNC's report dated 26-1-2007, extracted in the counter-affidavit may be reproduced hereunder :

> *"Analysis of the technical offer by M/s. MJP on their model MJP 650 indicates that, this water jet has not been installed on any vessel where the Main Propulsion Engine is MTU 16V400090 series or of the same power density, whereas, MJP 750 or higher versions which can absorb more power than MJP 650 have been used with the MTU 16V4000M90 series engines. This is a clear indication that despite M/s. MJP's claim of MJP 650 can absorb the power delivered by MTU 16V4000M90 (which will be installed on these IPVs), it is yet to be practically proved/tried on any military or civil vessel of this power and speed range. Without a reference list for this water jet having been installed for a reasonable period of time on board a similar class of ship of similar operational requirement, the risks are there considerably."*

The fact that the water jet model No.MJP-650 offered by the petitioner has not been tried on the particular combination of the equipment with the power rating required by the 2nd respondent has not been disputed by the petitioner. As could be seen, the petitioner failed to give the track record of the water jet offered by it as required under the tender conditions. In the circumstances, the 2nd respondent has accepted the recommendations of the TNC and rejected its technical bid since the same was found to be unsuitable.

The law is well-settled that the scope of interference by this Court in contractual matters to which the State or its Instrumentality is a party is very limited and it is warranted only where the decision making process is vitiated on account of arbitrariness, unreasonableness, discriminatory, or where it is found to be *mala fide* or actuated by bias.

As could be seen, the controversy involved in this writ petition relates to evaluation of the petitioner's technical bid i.e., whether the water jet model offered by the petitioner satisfies the requirement of the 2nd respondent. The said question being highly technical in nature, requires to be decided by the technical experts. When once such evaluation was made by an expert body, specifically constituted for the said purpose, this Court will neither sit in appeal against the decision of the expert body nor make an independent investigation. Hence, the question whether the TNC committed any error in technically disqualifying the petitioner is beyond the scope of judicial review under Article 226 of the Constitution of India.

However, the learned Counsel for the petitioner vehemently contended that since the Tender Notice did not specify the requirement of MJP-750 model but only indicated the particulars of the vessel, design parameters and other factors, the 2nd respondent ought to have given an opportunity to the petitioner to revise its technical bid. It is also contended that since MJP-650 model offered by the

petitioner is equivalent to MJP-750 model and at any rate since the petitioner by letter dated 21-2-2007 informed its readiness and willingness to supply water jet model MJP-750 at the same price quoted for MJP-650 in their price bid, there is absolutely no justifiable reason in technically disqualifying the petitioner. The learned Counsel for the petitioner further contended that the 2nd respondent having called upon the petitioner by letter dated 15-3-2007 to submit its revised offer cannot go back and reject the petitioner's technical bid without considering its revised bid.

I do not find substance in any of the above contentions.

Having voluntarily participated in the Tender without raising any objection as to the alleged ambiguity of the commercial/technical aspects, it is not open to the petitioner to contend after rejection of its technical bid, that the 2nd respondent ought to have been more precise about its requirement.

It needs no reiteration that the Tender Inviting Authority has got the discretion to choose its own method/form of Invitation To Tender keeping in view the nature of the work for which the tenders are invited. Such discretion cannot be subjected to judicial scrutiny unless the same is so arbitrary or irrational or ex facie in violation of Article 14 of the Constitution of India. Merely because one of the unqualified bidders feels that some other method/form would have been fair or logical, the Invitation to Tender cannot be held to be bad or discriminatory.

It is also relevant to note that as per Condition No.1.3 of the Tender Conditions if the bidders need any clarifications on techno-commercial points they may approach the 2nd respondent immediately before submission of their bid. Though the petitioner requested to furnish some clarifications there was no complaint as to want of details of 2nd respondent's requirement. Hence, it is not open to the petitioner to contend that Invitation to Tender itself was vague ad

ambiguous.

May be that, the petitioner was ready and willing to offer MJP-750 Model and that the 2nd respondent by letter dated 15-3-2007 called upon the petitioner to submit its revised offer, however that itself does not give rise to any legal right and is not enforceable in a Court of Law. As a matter of fact, it was explained by the 2nd respondent that such letter was addressed to both the petitioner and the 4th respondent as a part of the deliberations in the process of consideration of the tenders in accordance with the Chief Vigilance Commission Guidelines.

It is also relevant to note that Clause No.35 of the Defence Procurement Manual prohibits entertaining the improvements to technical bids already submitted by a tenderer. In the light of such an express provision, the mere fact that the 2nd respondent addressed a letter calling for revised offer will not entitle the petitioner to seek a Mandamus compelling the 2nd respondent to accept its revised offer.

As held by the Supreme Court in TATA CELLULAR vs. UNION OF INDIA[1] there can be no question of infringement of Article 14 of the Constitution of India if the Government tries to get the best person or the best quotation and that the right to choose cannot be considered an arbitrary power except where such power is exercised for any collateral purpose. The principles laid down by the Apex Court in the said decision may be extracted hereunder :

> *"…1. The modem trend points to judicial restraint in administrative action.*
>
> *2. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *3. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting*

its own decision, without the necessary expertise which itself may be fallible.

4. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

5. The government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

Again in AIR INDIA LIMITED vs. COCHIN INTERNATIONAL AIRPORT LIMITED[2], the Supreme Court held as under:

"..The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms; standards and procedures laid down by them and

cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

Having regard to the settled legal principles noted above, I am unable to hold that the action of the 2nd respondent in rejecting the technical bid of the petitioner suffers from any infirmity warranting interference by this Court.

It is also relevant to note that quotations were invited from the petitioner and the 4th respondent who are the short-listed suppliers on the basis of the same specifications mentioned in the tender documents. Pursuant thereto, when both the suppliers made their offers, it is for the 3rd respondent to select the best suited model among the offers made by the short-listed suppliers. Precisely the same was done by the 3rd respondent in choosing MJP-750 model offered by the 4th respondent. The mere fact that the petitioner is also capable of supplying MJP-750 model and that subsequently the petitioner made such an offer is irrelevant since the same would amount to a revised offer which is impermissible.

For the aforesaid reasons, it cannot be said that the 2nd respondent has committed any irregularity or illegality in the decision making process much less it is vitiated on account of arbitrariness or

mala fides.

However, the learned Counsel for the petitioner vehemently contended that under the Defence Procurement Manual holding negotiations with one manufacturer is impermissible and therefore the only course open is to invite fresh tenders. In support of his submission, the learned Counsel for the petitioner placed reliance upon 4.17 of the Defence Procurement Manual, 2006 which runs as under :

> 4.17. If at TEC stage only one vendor is found complying to all the SQR parameters, then the RFP would be retracted with the approval of CFA and a fresh RFP issued by suitably reformulating SQRs.

After going through the Defence Procurement Manual, 2006 carefully, I am unable to hold that there is any such total prohibition. It is true that the clause extracted above provides that at least two parties should participate in the price negotiations. However the Defence Procurement Manual deals with various categories of Tenders for different kinds of equipment and it is not clear whether clause-4.17, extracted above, is applicable to the Tender in question for which the approved makers/suppliers were already short-listed by the 3rd respondent and the tenders were invited only from two approved suppliers.

As a matter of fact, the counter-affidavit filed on behalf of the 2nd respondent shows that in pursuance of the complaint made by the 4th respondent, the 1st respondent – Union of India convened a meeting and reviewed the entire tender process in the light of the Defence Procurement Manual and ultimately decided that the reconsideration of the technical bids with fresh offer is unacceptable. Thus, it appears that the 1st respondent who has issued the Defence Procurement Manual has already taken a decision having applied its mind to the provisions of the Defence Procurement Procedure. However, since no counter-affidavit has been filed before this Court by the 1st

respondent putting forth its stand with regard to the applicability of Clause-4.17 of the Defence Procurement Manual, and particularly keeping in view that the equipment sought to be procured is for the defence operations, I deem it appropriate to dispose of the writ petition with a direction to the 1st respondent to consider whether Clause-4.17 of the Defence Procurement Manual is attracted to the Tender in question and whether the action of the 2nd respondent in holding price negotiations with only one party is in accordance with its policy and pass appropriate orders. Such exercise shall be completed as expeditiously as possible preferably within a period of two weeks from the date of receipt of this order. Till such time, the Status Quo ordered by this Court shall continue.

The Writ Petition is accordingly disposed of. No costs.

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G. ROHINI,J.

Dt. 07–09-2007

Kgr/gbs

Note:- CC by 10-9-2007.

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[1] AIR 1996 SC 11

[2] 2000 (2) SCC 617;